92-722

No. ____

Supreme Court
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In The
Supreme Court of the United States
October Term, 1992

SPENCER GIFTS, INC.,

Petitioner,

v.

JOHN D. OLITSKY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 26, 1992

QUESTIONS PRESENTED

1. Where a plaintiff testified on the first day of a retrial to a new jury (after reversal of the previous judgment on appeal) that he had recovered "a large amount of money" in the previous trial, did the court of appeals err, and establish a doctrine contradictory to Fed. R. Civ. P. 46 and Fed. R. Evid. 103(a), by upholding the denial of defendant's motion for a mistrial in part on the ground that the defendant had not filed a pretrial motion *in limine* seeking to exclude the evidence?

2. In the circumstances outlined in Question 1., did the court of appeals also err, and conflict with holdings of this Court and other federal courts of appeals, in upholding the denial of the motion for mistrial in part on the ground that the evidentiary doctrines applicable in this, a civil trial, are not the same, but "at best weakly analogous," to those applicable in criminal cases?

LIST OF PARTIES AND RULE 29.1 LIST

The parties before the court of appeals and this Court are all listed in the caption. Spencer Gifts, Inc.'s parent company is MCA, Inc. Spencer Gifts, Inc.'s only non-wholly owned subsidiary is Matsushita Industrial Electrical Company, Ltd.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Spencer Gifts, Inc., prays that a Writ of Certiorari be issued to review the opinion and order of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on June 22, 1992.

OPINIONS BELOW

The opinion of the court of appeals is reported at 964 F.2d 1471 (5th Cir. 1992), and is attached hereto (Petitioner's Appendix ("Pet. App.") at 1a-19a). The order of the Fifth Circuit denying Spencer's petition for rehearing, issued July 28, 1992, is unreported and is attached hereto (Pet. App. at 33a-34a). The district court did not render a written opinion; oral rulings memorialized in the trial transcript are attached hereto (Pet. App. at 20a-32a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendition of judgment. The decision for which review is sought was entered June 22, 1992 (Pet. App. at 1a-19a). Pursuant to this Court's rule 13.4, the time for filing a petition for certiorari runs from the date of the denial of a petition for rehearing. A petition for rehearing was timely filed, and rehearing was denied on July 28, 1992 (Pet. App. at 33a-34a).

STATEMENT OF THE CASE

1. The First Trial, Appeal, and Reversal

In December 1983, Respondent John D. Olitsky was terminated from his employment with Spencer Gifts, Inc. Subsequently, Olitksy filed a complaint against Spencer alleging violation of the Age Discrimination Employment Act of 1967, 29 U.S.C. § 621 *et seq.* and the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* At trial, in February 1987, Spencer argued that Olitsky had been discharged because of poor performance and as a result of a department reorganization. The jury returned a verdict for Olitsky and a judgment of $1,112,110, with interest, was awarded. On Spencer's appeal, the Fifth Circuit reversed and remanded for a new trial because the district court had erroneously admitted materials created for, and provided to, the EEOC as part of its investigation of Olitsky's claim and conciliation efforts. *Olitsky v. Spencer Gifts, Inc.*, 842 F.2d 123 (5th Cir.), *cert. denied*, 488 U.S. 925 (1988).

2. Discovery for the Second Trial

After the first trial, Spencer conducted discovery intended to elicit information as to what Olitsky would say at the second trial regarding his efforts to mitigate his damages. In particular, Spencer asked Olitsky at his deposition if after the first trial he had had conversations with others in the gift industry about his lawsuit. Additionally, Spencer asked Olitsky, in written interrogatories, for the names of all persons having knowledge of facts relevant to the lawsuit and all persons having information relevant to any claims or defenses in the matter. Spencer specifically requested that each interrogatory be seasonably supplemented. Olitsky responded to these requests, purporting to provide full and complete answers. However, as we shall detail below, Olitsky surprised Spencer by testifying at the second trial that he had had a critical

conversation about which he did not provide any information in discovery.

3. The Second Trial

A second trial was held from September 25 through October 4, 1990. Before the trial commenced, Spencer submitted a proposed jury instruction regarding the jury's consideration of the fact that the case was being heard on retrial. Also before trial both parties submitted motions *in limine* addressing various evidentiary issues. At the outset of trial, the district court ruled that it would deny all of the motions *in limine* (except to the extent that they had been conceded by the opposing party). Pet. App. at 20a-21a. The court did not rule on the proposed jury instructions.

Olitsky was the first witness called by his counsel. During his direct examination, Olitsky's counsel questioned him regarding his efforts to secure new employment after being terminated from Spencer. During a bench conference, the district court asked Spencer to clarify its position on Olitsky's mitigation of damages. Spencer's counsel answered that Spencer did not dispute that Olitsky "made efforts to find other work[]," but argued that, in light of other factors, this was not sufficient to satisfy Olitsky's duty to mitigate his damages. Pet. App. at 22a. As we shall see, the district court later asserted that in this response Spencer's counsel had "danced around" the question of Spencer's position on mitigation, but at the time there were no indications from the court or opposing counsel that they failed to understand this assertion.[1]

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[1] Although he had obtained other employment after being terminated by Spencer, Olitsky had also been terminated by his new employers. It was Spencer's position that a plaintiff who is terminated for cause from new employment has not mitigated damages. *See* Defendant's Proposed Jury Instructions at 52-54.

On the morning of the first full day of testimony, the following exchange occurred between Olitsky and his counsel:

> Q: What kind of problems have you encountered that have kept you from getting high level employment since being terminated at Spencer Gifts and since the first trial of this case?
>
> A: Well, there are several perspectives. First of all, my age, I keep getting older. Also --
>
> Q: That's good, isn't it?
>
> A: That I'm getting old?
>
> Q: That you keep getting older.
>
> A: It's going to happen to everybody some day. *Also, since the first trial it's more difficult because the entire gift industry is aware I won that case for a large amount of money.*

Pet. App. at 22a-23a (emphasis added).

Upon hearing this open reference to the size of the jury verdict from the earlier trial, counsel for Spencer immediately objected and moved for a mistrial, arguing that Olitsky's testimony that he had won the first trial for a large amount of money was so prejudicial that no corrective instruction could remove the prejudice from the jurors' minds. Olitsky's counsel argued that the testimony was relevant to Olitsky's claim that he mitigated his damages. Olitsky's counsel then stated that Olitsky would testify that a person who works in the gift industry, whom he had not told about the verdict in the first trial, approached him to congratulate him on his award. Upon hearing this, Spencer's counsel informed the court that this

person's identity had never been disclosed in discovery -- including the deposition question that requested details of any conversations concerning the first trial. Pet. App. at 28a.

During argument on the motion for a mistrial, the district court asked why, if the testimony was so prejudicial, it had not been addressed in Spencer's motion *in limine*. Pet. App. at 25a. But Spencer had known nothing of this information because Olitsky's responses to discovery had not disclosed that the conversation had taken place. To Spencer's assertion that the question had served no purpose because Spencer was conceding that Olitsky had sought other work, the district court responded that Spencer had not been clear, but had "danced around" the issue of mitigation of damages. Pet. App. at 27a. However, again, the court did not explain, at that time or at any subsequent point in the trial, why it thought Spencer had "danced around" this issue.

The district court denied Spencer's motion for a mistrial, and instructed the jury to disregard any testimony regarding the previous trial or its outcome. But Olitsky's counsel continued to elicit testimony from Olitsky on this same subject.[2] The following exchange immediately followed the court's instruction:

> Q: Mr. Olitsky, I'm not going to ask you to repeat anything you have said before, but you were testifying about a comment that was made to you. Where was that comment made?
>
> A: I was at the World Trade Center here in Dallas or Irving.

---

[2] Spencer's trial counsel decided not to object to each question asked by Olitsky's counsel on this issue so as not to further emphasize to the jury the testimony concerning the verdict in the prior trial.

Q: Who made that comment to you?

A: The man's name was Bruce Shouting, S-h-o-u-t-i-n-g, I believe.

Q: Who was he?

A: He was a salesman. He is a salesman who used to sell merchandise to Spencer Gifts. He used to sell us the MASH T-shirts.

Q: Other than that piece of information about the word getting around, are you aware of other ways in which the first trial received publicity?

A: Yes, I am.

Q: Specifically?

A: There was a headline on the Sunday after the trial in Atlantic City stating that I had won the case.

Q: And stating the amount. I'm not asking you the amount.

A: It stated the amount that I won.

Pet. App. at 32a.

At the close of trial, the court again instructed the jury to disregard any testimony regarding the outcome of the first trial. The jury found for Olitsky. Judgment in the total amount of $1,623,000, with interest, was entered on October 12, 1990.

4. Decision On Appeal

On appeal, Spencer argued, *inter alia*, that the controlling case law held that no curative instruction is sufficient to eliminate the prejudice caused by a deliberate mention of the jury verdict resulting from an earlier trial. Spencer emphasized that the offending testimony had occurred in the morning on the first full day of testimony, and that the disruption of a mistrial would have been small. In addition, Spencer argued that since the purported conversation between Olitsky and Bruce Shouting had not been disclosed in discovery, Olitsky was surprised by its disclosure and certainly could not have anticipated it.

The Fifth Circuit affirmed. While it noted that the cases cited by Spencer stood for the proposition that the disclosure of the result of a previous trial is prejudicial, it sought to distinguish those cases stating that, in its view, the curative instructions given by the district court in this case were superior to those in the cited cases. Pet. App. at 8a-9a. However, the court of appeals did not base its decision solely on this ground. The court went on to hold -- ignoring Spencer's argument that the substance of Olitsky's testimony had not been known before trial because it had not been disclosed in discovery -- that Spencer brought the prejudice upon itself by failing to seek to exclude the testimony in its pre-trial motion *in limine*. Pet. App. at 8a. In addition, the Fifth Circuit held that Spencer brought the prejudice upon itself by "danc[ing] around" the issue of whether it contended that Olitsky failed to mitigate his damages. Pet. App. at 8a. Like the district court, the court of appeals did not explain what this meant. Lastly, the court of appeals held that since the Fifth Circuit case on which Spencer relied was a criminal action, the holding in that case was not persuasive because the evidentiary standards applicable in civil cases are less stringent than those in criminal cases. Pet. App. at 9a. Spencer filed a timely petition for rehearing by the Fifth Circuit on July 6,

1992, which was denied on July 28, 1992. Pet. App. at 33a-34a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Fifth Circuit has radically changed pretrial proceedings in the federal courts, by effectively preventing Spencer from questioning an important evidentiary issue on appeal because Spencer had failed to file a pre-trial motion *in limine* to preserve error. In so holding, the court of appeals' decision conflicts with the express provisions of Fed. R. Civ. P. 46 and Fed. R. Evid. 103(a), both of which provide that objection at trial to an evidentiary ruling is sufficient to preserve error on appeal.

As a practical matter, the Fifth Circuit's holding will cause litigants, fearing that any evidentiary objection not raised pre-trial would not be sufficient to preserve error, to flood the courts with motions *in limine* relating to every conceivable evidentiary objection.

In addition, the Fifth Circuit's holding that the evidentiary standards in civil cases are different from, and more lenient than, those in criminal cases conflicts with applicable decisions of this Court, the Fifth Circuit itself, and other courts of appeals.

A. By Faulting Spencer Gifts For Failing To File A Motion *In Limine* In Order To Preserve Error For Appeal, The Fifth Circuit Imposed A Requirement That Conflicts With The Federal Rules Of Civil Procedure And The Federal Rules Of Evidence

It is unquestioned that the plaintiff Olitsky's testimony about the size of the jury verdict in the first trial of this case was highly prejudicial, and that corrective instructions by the trial court are inadequate to counteract the inflammatory and prejudicial evidence. *See, e.g., United States v. Williams*, 568 F.2d 464 (5th Cir. 1978); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975). Nonetheless, the court of appeals affirmed the district court's refusal to order a mistrial, holding that "Spencer was at least partly to blame for the disclosure [of the result of the first trial]" by "fail[ing] to raise the issue . . . in its motion *in limine*." Pet. App. at 8a. Thus the court of appeals used the fact that Spencer had not made a pretrial motion to exclude the evidence a ground for its refusal to find error in the district court's denial of Spencer's motion for a mistrial. But the Federal Rules of Civil Procedure and the Federal Rules of Evidence both explicitly provide that a objection at trial *alone* is sufficient to preserve error. Under Fed. R. Civ. P. 46 and Fed. R. Evid. 103(a), therefore, Spencer's objection to plaintiff's testimony about the size of the verdict in the first trial, and Spencer's motion for a mistrial, were timely. The effect of the Fifth Circuit's ruling is to turn the wholly discretionary procedure of pre-trial motions *in limine* into a mandatory one.

Rule 46, Fed. R. Civ. P., provides that to preserve error for appeal "it is sufficient that a party, *at the time of the ruling or order of the court is made or sought*, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the

grounds therefor . . . ." (emphasis added).[3] The purpose of Rule 46 "is to give a district court notice of an alleged defect so that the court has an opportunity to cure it." *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1060 (5th Cir. 1990); *see also Colonial Refrigerated Transp., Inc. v. Mitchell*, 403 F.2d 541, 552 (5th Cir. 1968).

The Federal Rules of Evidence are to the same effect. Where the error is based upon an evidentiary ruling, a "timely objection or motion to strike . . . stating the specific grounds for the objection" is all that is necessary to preserve error. Fed. R. Evid. 103(a)(1). The rationale behind Rule 103(a) is the same as that behind Rule 46. *See* Fed. R. Evid. 103(a) advisory committee's note (timely objection is necessary "so as to alert [the court] to the proper course of action and enable opposing counsel to take proper corrective measures").

By contrast, motions *in limine* are not provided for by the Federal Rules. *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984) ("Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage

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[3] There is one exception, which proves this rule. In criminal proceedings, the federal rules do require a defendant to file a pre-trial motion if he seeks to exclude evidence which he alleges was obtained in violation of his constitutional rights. Fed. R. Crim. P. 12(b)(3). However, this rule does *not* apply to any other evidentiary matters; a defendant may raise other evidentiary issues before trial, or he may reserve his right to raise them at trial. *United States v. Barletta*, 644 F.2d 50, 55 (1st Cir. 1981); *see also United States v. Gomez Benabe*, 781 F. Supp. 848, 856 (D.P.R. 1991).

The rationale for this requirement is of a practical nature. When a criminal defendant prevails on a suppression motion, the government, rather than being forced to decide whether to proceed with the prosecution without the suppressed evidence, may appeal the ruling. 18 U.S.C. § 3731. In a civil case, however, when the court rules on a motion *in limine*, the parties must adjust their trial strategies to accommodate the ruling, and may only appeal the ruling after a final judgment.

the course of trials."). In fact, their use is wholly discretionary, and "[a]s motions *in limine* are not provided for in the Federal Rules of Civil Procedure and are merely requests for the Court's guidance, a court may, in the exercise of discretion, decline to make a pretrial ruling." *Hunter v. Blair*, 120 F.R.D. 667, 667 (S.D. Ohio 1987).[4] Indeed the discretionary nature of motions *in limine* is demonstrated by the fact that the district court in the present case refused to rule on the motions *in limine* that had been filed, holding that it would rule on those matters as, and if, they arose at trial. Pet. App. at 21a. As both the decision by a litigant to file a motion *in limine*, and the decision by a court to address such a motion, are discretionary, it is a severe departure from the norm to make the filing of motion *in limine* mandatory by penalizing the appellant for not having filed such a motion.

Indeed, there is a good deal of confusion in the federal courts of appeals over the proper role, and the legal effect, of motions *in limine* in civil trials. Although until the present case no federal court had held that a motion *in limine* is necessary to preserve error for appeal in a civil case, the courts of appeals are divided on whether a motion *in limine* is sufficient to preserve error if the matter is not again raised at

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[4] In fact, many federal courts have indicated that they disfavor the use of motions *in limine*. *See, e.g., Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir.) ("Orders *in limine* which exclude broad categories of evidence should rarely be employed. A better practice is to deal with questions of admissibility of evidence as they arise."), *cert. denied*, 423 U.S. 987 (1975).

trial.[5] Though the Fifth Circuit has, in the instant case, required a motion *in limine* to preserve error, it has -- inconsistently, we submit -- also held that "[a] party whose motion *in limine* is overruled must renew his objection when the evidence is about to be introduced." *Wilson v. Waggener*, 837 F.2d 220, 222 (5th Cir. 1988); *see also Petty v. Ideco, Div. of Dresser Industries, Inc.*, 761 F.2d 1146, 1150 (5th Cir. 1985). The Fifth Circuit explained that:

> Motions *in limine* are frequently made in the abstract and in anticipation of some hypothetical circumstance that may not develop at trial. When a party files numerous motions *in limine*, the trial court may not pay close attention to each one, believing that many of them are purely hypothetical. Thus, a party whose motion *in limine* has been overruled must object when the error he sought to prevent with his motion is about to occur at trial. This will give the trial court an opportunity to reconsider the grounds of the motion in the light of the actual -- instead of hypothetical -- circumstances at trial.

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[5] Although the federal courts have not been clearly presented with the issue of whether a motion *in limine* may be required to preserve error, the Texas Supreme Court has, and has held that:

> A proper objection made at the time evidence is offered is sufficient to preserve the right of review of error committed in admitting it, and *a motion in limine is not a necessary predicate for complaint on appeal* that the admission of evidence was error and that the error was prejudicial.

Bridges v. City of Richardson, 354 S.W.2d 366, 367 (Tex. 1962) (emphasis added).

Collins v. Wayne Corp., 621 F.2d 777, 784 (5th Cir. 1980).[6] This passage, which accurately discusses the practicalities of pre-trial evidentiary motions in civil cases, demonstrates the lack of soundness in the Fifth Circuit's holding in the present case and provides a glimpse of the uselessness, bother, and proliferation of hypothetical issues that the present holding will engender.

On the other hand, courts which do not require an objection at trial after a motion *in limine* has been denied reason that to do so would, in effect, require an exception, contrarily to Rule 46. *Palmerin v. City of Riverside*, 794 F.2d 1409, 1412 (9th Cir. 1986); *see also United States v. Wood*, 943 F.2d 1048, 1054-55 (9th Cir. 1991); *Cook v. Hoppin*, 783 F.2d 684, 691 n.2 (7th Cir. 1986); *American Home Assur. v. Sunshine Supermarket*, 753 F.2d 321 (3d Cir. 1985).

In a practical sense, the Fifth Circuit's ruling will wreak havoc among litigants and for the courts. In order to be sure that error will be preserved for appeal, a civil litigant in the Fifth Circuit must now anticipate every possible evidentiary issue which might arise at trial and address these issues *in limine*. This will spell disaster for the courts which will be

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[6] *See also McEwen v. Norman*, 926 F.2d 1539, 1544 (10th Cir. 1991) ("A party whose motion *in limine* has been overruled must nevertheless object when the error he sought to prevent by his motion occurs at trial. Only by specific, timely trial objection can the trial court entertain reconsideration of the grounds of the motion in light of the actual trial testimony and the surrounding circumstances developed at trial."); *Conway v. Electro Switch Corp.*, 825 F.2d 593, 596 n.1 (1st Cir. 1987) ("counsel must exercise caution in relying exclusively upon rulings made in connection with pretrial motions *in limine* as the basis for preserving claims of error in the admission and exclusion of evidence"); *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1504 (11th Cir. 1985); *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1333 (8th Cir. 1985) ("A motion *in limine* does not preserve error for appellate review. A party whose motion *in limine* has been overruled must object when the error the party sought to prevent with the motion is about to occur at trial.")

forced to either rule on voluminous pre-trial motions, or, more probably, to put over until trial *all* evidentiary issues. Litigants will be ill-served by having their counsel spending hours attempting to anticipate every possible evidentiary issue, and courts will be deluged with all sorts of evidentiary issues which may be hypothetical at best and conjectural at worst.

Finally, the absurdity of such a rule is evidenced by Spencer's predicament in this case. Because the plaintiff Olitsky had not disclosed in discovery the information that served as the basis for the disputed testimony, Spencer had no reason to suspect that its opponent might seek to introduce that particular testimony about the size of the verdict in the first trial. Nonetheless, the court of appeals faulted Spencer for having failed to file a motion *in limine* seeking to preclude the evidence, and used that failure as a key part of its holding on appeal.[7]

B. The Fifth Circuit's Ruling That Evidentiary Holdings In Criminal Cases Are Not Binding On Civil Cases Is Inconsistent With The Cases Decided By This Court

In addition to holding that Spencer brought any prejudice upon itself by failing to file a motion *in limine*, the Fifth Circuit also rejected Spencer's reliance upon *United States v. Williams*, 568 F.2d 464 (5th Cir. 1978). The *Williams* court had held that where several jurors learned, via a television broadcast, that a criminal defendant had been convicted in a previous trial, no instruction to the jury would be sufficient to cure the prejudice to the defendant. *Id.* at 471. In addition to holding that in some unspecified way the curative

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[7] Thus it can be seen that the court of appeals' holding also places a new premium on tactics of misleading opponents about what evidence will be introduced.

instruction given in the present case was superior to those of other cases, the Fifth Circuit added that "evidentiary rulings in criminal trials, with their constitutional overtones, are at best weakly analogous in civil cases." Pet. App. at 9a. This holding is flatly inconsistent with the cases decided by this Court as well as with precedent from the Fifth Circuit and other courts of appeals.

It has been long recognized that, in general, the rules of evidence in criminal and civil cases are the same. *See United States v. Gooding*, 25 U.S. (12 Wheat.) 467 (1827); *Kercheval v. United States*, 36 F.2d 766, 767 (5th Cir.), *cert. denied*, 281 U.S. 745 (1930). Indeed, the Federal Rules of Evidence "apply generally to civil actions and proceedings . . . [and] to criminal cases and proceedings . . . ." Fed. R. Evid. 1101(b). When faced with the question of whether to apply an evidentiary ruling decided in a civil case to a criminal case, the Fifth Circuit stated that the appellant's argument that the civil case was inapposite to the criminal case was mistaken. *United States v. Williams*, 447 F.2d. 1285, 1291 (5th Cir. 1971), *cert. denied*, 405 U.S. 954 (1972).

> We know of no authority for the general proposition that a more stringent hearsay rule must be applied in criminal than in civil cases. The Constitution protects the defendant in criminal prosecutions through the confrontation clause and the presumption of innocence. These are in no way undermined by applying the same hearsay standards in criminal as in civil cases.

Id. Similarly, the Third Circuit has held that the standard of review for harmless error must be the same in civil cases as in criminal cases. *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 926 (3d Cir. 1985).

> We fail to see the force of the distinction [between civil and criminal verdicts]. Verdicts are the result of the same serious deliberation by the jurors no matter what the standard of proof. This is especially so today, when, with the proliferation of cases involving civil rights, huge damage awards and forfeitures, the stakes in civil cases are so high, and the infringement of the jury verdict caused by a harmless error finding may be as important in the civil context as in the criminal.

Id. The Fifth Circuit's holding that an evidentiary ruling in a criminal case is only "at best weakly analogous" to a civil case is contrary to the long-standing rule of this Court that evidentiary rules are to be applied equally in both civil and criminal cases.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SPENCER GIFTS, INC.,

Petitioner,

v.

JOHN D. OLITSKY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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October 26, 1992

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APPENDIX A

United States Court of Appeals
For the Fifth Circuit

No. 91-1010

JOHN D. OLITSKY,

Plaintiff-Appellee, Cross-Appellant,

v.

SPENCER GIFTS, INC.,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
For the Northern District of Texas

Before BROWN, KING and WIENER, Circuit Judges.

WIENER, Circuit Judge:

Spencer Gifts, Inc. (Spencer) appeals a judgment against it for firing John D. Olitsky in violation of the Age Discrimination in Employment Act (ADEA)[1] and the Employee Retirement Income Security Act (ERISA).[2] Olitsky cross-appeals, arguing that the district court erroneously refused to double the jury's award of front pay as liquidated damages under the ADEA. Finding no merit to the arguments of either party, we affirm.

I.
FACTS

In December 1983, Spencer fired Olitsky from his position as merchandise manager. Olitsky was 53 years old. Spencer originally hired Olitsky in 1973, when he was 42 years old, as a buyer for its retail store division. Olitsky resigned from Spencer in 1979 to take a position with another company. In 1981, Spencer again hired Olitsky, who was then 50 years old, as a merchandise manager. Spencer performed well in that position in 1981 and 1982 and received favorable evaluations.

In October 1983, Hank Roth, a general merchandise manager for Spencer, informed Olitsky that his performance had deteriorated and that the buyers whom he supervised were not performing adequately. When Roth dismissed Olitsky in December 1983, he explained to Olitsky that he had not satisfactorily improved his performance, that Spencer was in the process of reorganizing its merchandise department, and

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[1] 29 U.S.C. §§ 621-634.

[2] 29 U.S.C. §§ 1001-1461.

that as a result of the reorganization, there would be no room for Olitsky. When he was fired, Olitsky was only a few months from meeting the ten-year vesting period of his benefits under Spencer's pension plan.

Olitsky filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that Spencer fired him because of his age. After the EEOC conducted an investigation, but before it made a determination of Olitsky's charge on the merits, Olitsky brought suit in federal district court, alleging violations of the ADEA and ERISA. After a jury trial, the district court entered judgment in favor of Olitsky on both claims. In *Olitsky I*,[3] we reversed and remanded, holding that the district court had erroneously admitted into evidence the EEOC's file on Olitsky's charge.

On remand, the jury returned a verdict for Olitsky, finding that Spencer willfully discriminated against Olitsky on the basis of age, and awarding him backpay of $500,000 and lost pension benefits of $100,000. The district court accepted the jury's finding of willfulness, doubled the jury's backpay and lost pension benefits awards as liquidated damages, awarded $400,000 as front pay and $123,000 as lost pension damages under Olitsky's ERISA claim.[4] Spencer appeals.

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[3] *Olitsky v. Spencer Gifts, Inc.*, 842 F.2d 123 (5th Cir.), *cert. denied*, 488 U.S. 925, 109 S. Ct. 307, 102 L. Ed. 2d 326 (1988).

[4] The district court stated that in light of its $123,000 award as lost pension benefits under ERISA and the jury's award of $100,000 as lost pension benefits under the ADEA, Olitsky would be entitled to recover only $123,000 for lost pension benefits (in addition to $100,000 as liquidated damages for willfulness) so as to prevent a double recovery.

II.
ANALYSIS

Spencer challenges several aspects of the district court proceedings in this appeal. It argues that the district court erroneously (1) admitted certain documents and testimony into evidence, (2) refused to give jury instructions on disputed *prima facie* elements of Olitsky's ADEA claim, and (3) determined that Spencer violated ERISA when it fired Olitsky. Olitsky argues on cross-appeal that the district court erred in failing to double his front pay award after the jury found that Spencer acted willfully in violating the ADEA.

A. Admission of Evidence.

The admission of evidence is within the sound discretion of the district court. We will reverse a district court's evidentiary rulings only upon a finding of abuse.[5]

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[5] *Jon-T Chems., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1417 (5th Cir. 1983).

1. Result of the Prior Trial.

During Olitsky's direct examination at trial, he testified as follows:

> Q. What kinds of problems have you encountered that have kept you from getting high level employment since being terminated at Spencer Gifts and since the first trial of this case?
>
> * * *
>
> A. [S]ince the first trial it's more difficult because the entire gift industry is aware I won that case for a large amount of money.

Spencer immediately moved for a mistrial, arguing that Olitsky's statement about the result of the first trial was extremely prejudicial to Spencer and that the prejudice could not be cured by a jury instruction.

The district court conducted a bench conference and noted that Spencer had allowed Olitsky to refer to the prior trial in his opening statement without objection, and that Spencer did not raise the issue in its motion *in limine*, even though that motion did address several issues that the district court considered "a lot less harmful than [reference to the prior trial]." There was also a discussion about whether Spencer was contending that Olitsky did not mitigate his damages by diligently searching for employment and whether Olitsky offered the testimony about the first trial to rebut that contention. The district court stated that it had asked Spencer earlier in the trial whether it was making such a contention, but that Spencer "danced around that question" and did not specifically deny that it was.

The district court concluded the bench conference by denying Spencer's motion for mistrial, stating again that it did not understand why Spencer did not raise the issue in its motion *in limine*. The district court recalled the jury and gave the following instruction:

> [Y]ou have heard testimony about a previous trial of this case. The fact that this is the second trial is irrelevant to your consideration of this case. You should not consider the fact of a previous trial or its outcome in any way. Your verdict in this case must be based solely upon the facts as you find them from the evidence introduced at this trial with the law as I shall give to you during the trial or at the end of the case.

The district court further instructed the jury before it retired to deliberate:

> You have heard that there was a previous trial of this case. Except for testimony from that trial which has been admitted as evidence in this trial, you should disregard everything about that earlier trial in reaching your verdict in this case. Common sense will tell you that the adjudication from the earlier trial must have been flawed; otherwise, we would not have spent all of the time and effort required by this trial to determine the rights and liabilities of the parties. If you should allow the fact of the previous trial or its outcome to influence you, that would be improper, and all of the time and effort spent on this trial will have been wasted.

In arguing that the evidence of the result of the first trial was so prejudicial that the curative instruction was not adequate to eliminate the harm, Spencer relies on *United*

States v. Williams.[6] In that case, a criminal defendant and his three co-defendants were convicted in a jury trial, but the district court granted their motion for new trial. On the third day of the second trial, the government informed the district court that a local television news broadcast on the previous night had included a report about the trial. The report stated that the four defendants had previously been convicted, but that a new trial had been granted. The district court polled the jury, and two jurors admitted that they had seen the report. Both jurors stated that the report would not influence their decision in the case. The defendant moved for a mistrial, but the district court denied that motion. The district court instructed the jury to disregard everything not heard in court. The court proceeded with the trial, and the defendants were again convicted.

On appeal, we held that because the news report's mention of the result of the first trial was probative of guilt and highly prejudicial, the exposure of the two jurors to that information resulted in an unfair second trial.[7] We concluded that the prejudice was not corrected by the district court's instruction, and we reversed and remanded for a new trial.[8]

Spencer also relies on *Coleman Motor Co. v. Chrysler Corp.*[9] In that Third Circuit case, the plaintiff (Coleman) called as a witness Sam Liberto, who was the plaintiff in a previous suit against the same defendant (Chrysler), in which the allegations were identical to those in *Coleman*. In the previous suit, the jury had found that Chrysler conspired to

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[6] 568 F.2d 464 (5th Cir. 1978).

[7] *Id.* at 470-71.

[8] *Id.* at 471.

[9] 525 F.2d 1338 (3d Cir. 1975).

monopolize trade, but that Liberto had sustained no damages, so judgment was entered for Chrysler. In *Coleman*, Chrysler cross-examined Liberto about his suit against Chrysler and brought out the fact that Liberto had recovered no money from that suit. On redirect, Coleman asked Liberto whether the jury in his suit had found that Chrysler had conspired to monopolize trade, and he answered in the affirmative. Chrysler objected, but the district court allowed the testimony. The district court instructed the jury that they could consider the verdict in the previous trial in assessing the credibility of Liberto and in determining whether Chrysler had notice and intent. The Third Circuit held that Chrysler's reference to the previous verdict was a permissible attempt to show Liberto's bias, but that Coleman on redirect did not limit its questions about the previous verdict to an effort to rebut the implication of bias.[10] Thus, held the court of appeals, Coleman's references to the prior verdict were prejudicial and warranted a new trial because "[t]he admission of a prior verdict creates the possibility that the jury will defer to the earlier result and thus will, effectively, decide a case on evidence not before it."[11]

In the instant case, the disclosure of the result of the first trial did not prejudice Spencer to the extent Spencer would have us believe. Spencer was at least partly to blame for the disclosure, as the district court recognized. Spencer "danced around" the district court's question whether it was contending that Olitsky failed to mitigate his damages, and Spencer failed to raise the issue, which it now argues was incurably prejudicial, in its motion *in limine*.

In addition, the curative instruction given by the district court negated any prejudice that may have occurred and

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[10] *Id.* at 1350-51.

[11] *Id.* at 1351.

distinguishes the instant case from *Williams* and *Coleman*. In *Williams*, the trial court gave only "the usual instruction to disregard everything not heard in court. No specific instruction was given the two jurors to disregard the news report of the prior trial, nor were they instructed that the prior instructions were not evidence of guilt."[12] Additionally, such evidentiary rulings in criminal trials, with their constitutional overtones, are at best weakly analogous in civil cases.

In *Coleman*, the trial court instructed the jury that it *could* consider the result of the prior trial as evidence for a limited purpose. In the instant case, however, the district court clearly instructed the jury, on two occasions, that the first trial was irrelevant and that the jury was not to consider the occurrence or result of the first trial for any purpose. We conclude that those instructions were sufficient to cure any harm that may have resulted from the mention of the first trial and its results.

2. Spencer's Position Letter to the EEOC.

In *Olitsky I*, the district court admitted into evidence the entire file on this dispute prepared by Janice Johnson, an investigator for the EEOC. That file included Johnson's handwritten notes that reported Ronald Mangel, general counsel for Spencer, as saying he "can't rebut if McNally was promoted." McNally was a younger employee whom Spencer promoted when Olitsky was fired. Olitsky used Mangel's statement to argue to the jury that Spencer had admitted that it could not rebut the allegation of age discrimination. We stated that Mangel's supposed admission of liability was "the kind of exchange among the parties and the EEOC that informal conciliation ought to encourage" and that allowing

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[12] *Williams*, 568 F.2d at 466.

the use of such admissions in later litigation "would attach a penalty to the candor and forthrightness that Congress obviously believed were necessary to the successful conciliation of disputes."[13] We held that the admission of the entire EEOC file constituted reversible error.[14]

Johnson gave Spencer notice of Olitsky's claim by letter dated March 22, 1984. Mangel responded with a position letter dated April 11, 1984 to Johnson (the "Mangel letter"). That letter denied that Spencer had discriminated against Olitsky and stated that Olitsky was fired because his sales were inadequate. The Mangel letter also stated, in part, that "Ms. Jeri Hurvitz replaced Mr. Olitsky as Merchandising Manager. . . . Her birthdate is October 5, 1956." Spencer referenced the Mangel letter and attached a copy of it to its answers to Olitsky's interrogatories during pretrial discovery.

At the second trial on remand, Olitsky introduced Spencer's discovery responses, including the Mangel letter. Olitsky also introduced a summary chart that included references to and excerpts from the Mangel letter. The district court admitted those exhibits over Spencer's objection.

Spencer argues that the admission of the Mangel letter, which was part of Johnson's EEOC file that we held inadmissible as a whole in *Olitsky I*, violates both section 706(b) of Title VII of the Civil Rights Act of 1964[15] and the holding of *Olitsky I*.

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[13] *Olitsky I*, 842 F.2d at 127.

[14] *Id.*

[15] 42 U.S.C. § 2000e-5(b).

706(b) provides in part:

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. *Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned* (emphasis added).

In *Olitsky I* we stated that the admission of the entire EEOC file violated section 706(b), but we did not decide whether section 706(b) applied to an ADEA case.[16] Neither do we decide that question here, as we hold that the Mangel letter did not constitute conciliation evidence to which section 706(b) would apply.

The Mangel letter set forth purely factual information and related Spencer's position on the merits of Olitsky's claim. The letter contained no reference to conciliation efforts between Spencer and the EEOC. Spencer neither made any offers of settlement nor responded to any such offers by the EEOC in the Mangel letter. In *Branch v. Phillips Petroleum Co.*,[17] we distinguished between "purely factual material related to the merits of [the] charge" and "proposals and counter-proposals of compromise made by the parties during the [EEOC's] efforts to conciliate" and held that under section 706(b), disclosure of the former was allowable, but disclosure

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[16] *Olitsky* I, 842 F.2d at 126.

[17] 638 F.2d 873 (5th Cir. Unit A 1981).

of the latter was not.[18] We adhere to that distinction and hold that the Mangel letter does not constitute conciliation material that section 706(b), were it to apply, would render inadmissible.

Spencer argues that under the law of the case doctrine, our holding in *Olitsky I* prohibited the district court from admitting the Mangel letter. Spencer interprets that holding too broadly. In *Olitsky I* we held that the *entire EEOC file* was inadmissible, but we did not hold that each individual item within that file would be inadmissible in and of itself. Here we are presented with only one document from that file. Finding that the Mangel letter did not constitute conciliation material, we hold that the district court did not abuse its discretion in admitting that single letter into evidence.

3. Rumors of Hank Roth's Drug Use.

In its response to a pretrial interrogatory from Olitsky, Spencer stated that Gene Brog, the President of Spencer Gifts, had heard rumors that Hank Roth, Olitsky's supervisor, had used drugs. At trial, Olitsky cross-examined Brog, who approved Roth's decision to fire Olitsky, about those rumors and introduced Spencer's response to the interrogatory. Brog testified that he did not investigate those rumors. Olitsky maintained that, as Roth was younger than Olitsky, that evidence showed that Spencer treated younger employees more favorably than older employees and that Spencer's asserted reason for firing Olitsky was a pretext for age discrimination.

Spencer argues that the district court erred in admitting that evidence because (1) Olitsky did not establish a connection between the failure to investigate the rumors and Spencer's firing of Olitsky; (2) Olitsky did not prove that Roth

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[18] *Id.* at 881.

actually used drugs; (3) Olitsky did not show a connection between Brog's approval of Roth's decision to fire Olitsky and the fact that Brog heard rumors of Roth's drug use; and (4) under Fed. R. Evid. 403, any probative value of the evidence was substantially outweighed by the danger of prejudice, confusion of the issues, and misleading the jury. We are convinced that the evidence of Roth's rumored drug use was not unfairly prejudicial to Spencer, and we hold that the district court did not abuse its discretion in admitting it.

4. Olitsky's Open Heart Surgery.

Olitsky testified that he underwent open heart surgery in February 1984 while searching for another job. Spencer argues that the district court erred in admitting that testimony because it was irrelevant, and any probative value of that testimony was substantially outweighed by the danger of prejudice to Spencer. Olitsky asserts that, like his testimony about being "blacklisted" following his success in the original trial of this case, the evidence of heart surgery was offered to rebut Spencer's contention that Olitsky failed to mitigate his damages. As we noted above, Spencer did not clearly express to the district court whether or not it was making such a contention. Thus, the district court did not abuse its discretion in admitting Olitsky's testimony.

B. Jury Instructions.

Spencer contends that two elements of Olitsky's *prima facie* ADEA case[19] were in dispute and that the district court erred in refusing to submit jury questions on those two elements. Spencer asserts that the district court should have submitted jury questions on (1) whether Olitsky was qualified for the position he held with Spencer and (2) whether Olitsky was replaced by someone outside the protected class. By refusing to submit those questions, Spencer argues, the district court usurped the province of the jury.

We rejected that argument in *Walther v. Lone Star Gas Co.*.[20] In *Walther*, we stated:

> When the defendant has produced evidence of a nondiscriminatory reason for plaintiff's discharge, and plaintiff has had an opportunity to challenge that

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[19] In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973), the Supreme Court formulated an evidentiary procedure for race discrimination cases which has been adapted for ADEA cases. First, the plaintiff must prove a *prima facie* case of age discrimination, which consists of evidence that the plaintiff: (1) was discharged; (2) was qualified for the position; (3) was within the protected class at the time of discharge; (4) was replaced by someone outside the protected class; or (5) by someone younger; or (6) show otherwise that his discharge was because of age. *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1504-05 (5th Cir. 1988). If the plaintiff proves a *prima facie* case, a presumption of discrimination arises which the defendant must rebut by articulating a "legitimate, nondiscriminatory reason for its disparate treatment of the plaintiff." *Id.* at 1505. If the defendant succeeds in rebutting the presumption, the plaintiff must prove that the defendant's articulated reasons are mere pretexts for discrimination. The plaintiff can do this either by showing that a discriminatory reason more likely motivated the defendant or by showing that the defendant's reason is unworthy of credence. *Id.* (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)).

[20] 952 F.2d 119 (5th Cir. 1992).

> reason as pretextual, the trier of fact should proceed directly to the ultimate issue of whether the defendant intentionally discriminated against the plaintiff. The initial prima facie case is no longer relevant.
>
> Under the logic of *Aikens*, it is clear that the issue of whether a plaintiff made out a prima facie case has no place in the jury room. Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing. Instead, the court should instruct the jury to consider the ultimate question of whether defendant terminated plaintiff because of his age. To the extent our decisions before or after *Aikens* imply that the issue of prima facie case is a factual question for the jury to resolve, we reject such implications as dictum.[21]

The district court did not err in its instructions to the jury.

C. Olitsky's ERISA Claim.

Section 510 of ERISA prohibits employer action against an employee who participates in a pension benefit plan for "the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."[22] To recover under section 510, a plaintiff "need not show that 'the *sole* reason for his [or her] termination was to interfere with pension rights'; however, the plaintiff mush show

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[21] *Id.* at 126-27 (citations omitted).

[22] 29 U.S.C. § 1140.

that the employer had the 'specific intent to violate ERISA.'"[23] Olitsky contended that Spencer violated section 510 by firing him within a few months before Olitsky would have met the ten-year vesting requirement for benefits under Spencer's pension plan, thereby causing him not to receive any benefits under the plan.

Gene Brog testified that when Spencer rehired Olitsky in 1981, Brog mistakenly believed, and told Olitsky, that because of Olitsky's break in service with Spencer between 1979 and 1981, Olitsky was not entitled to credit for his years of service prior to 1979, so that he would have to start a new ten-year vesting period. Brog further testified that he did not learn that Olitsky had received credit for his prior years of service until after Olitsky was fired. Hank Roth also testified that he did not know the status of Olitsky's vesting when he made the decision to fire Olitsky. Spencer argues that there is thus no evidence that anyone involved in the decision to fire Olitsky knew that Olitsky was close to vesting when he was fired.

The district court did not submit Olitsky's ERISA claim to the jury. Rather, the district court acted as fact-finder on that claim and found that Spencer had violated section 510. The district court stated:

> [A]s I instructed the jury, I feel free to disbelieve the testimony of any witness, even if it is unimpeached. I did not find Mr. Brog to be a credible witness, at least on this issue about pensions, and I am persuaded by all the circumstantial evidence provided by the plaintiff that there was specific intent

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[23] *Clark v. Resistoflex Co., Div. of Unidynamics Corp.*, 854 F.2d 762, 770 (5th Cir. 1988) (quoting *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir.), *cert. denied*, 484 U.S. 979, 108 S. Ct. 495, 98 L. Ed. 2d 492 (1987)) (emphasis in original).

in the timing of his discharge to deprive him of his vesting in the pension plan.

We accept a trial court's findings of fact unless they are clearly erroneous or influenced by an incorrect view of the law.[24] Olitsky was fired shortly before the vesting of his pension benefits. Spencer contends that Olitsky was fired because of poor work performance and that the vesting of benefits did not enter into its decision to fire him. The district court chose not to give credence to the testimony of the individuals who made the decision to fire Olitsky, and reasonably inferred from the proximity of the date of firing to the date of vesting that Spencer intended to deprive Olitsky of his benefits. That finding was not clearly erroneous.

D. Doubling of the Front Pay Award.

The ADEA liquidated damages provision[25] states, in part:

> Amounts owing to a person as a result of a violation of this Chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of Sections 216 and 217 of this Title; Provided, That liquidated damages shall be payable only in cases of willful violations of this Chapter. In any action brought to enforce this Chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Chapter, including without limitation judgments compelling employment, reinstatement, or promotion, or enforcing the liability for amounts

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[24] *Branch-Hines v. Hebert*, 939 F.2d 1311, 1317 (5th Cir. 1991).

[25] 29 U.S.C. § 626(b).

> deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

Olitsky argues that a front pay award constitutes an "amount owing" under that provision, requiring the doubling of such an award as liquidated damages upon a finding of a willful violation of the ADEA. We have not previously addressed that question, but six other circuits have rejected Olitsky's argument.[26] Olitsky has not persuaded us that those circuits have interpreted that statute incorrectly. The district court thus did not err in refusing to double Olitsky's front pay award.

III.

CONCLUSION

The district court did not abuse its discretion in its evidentiary rulings, partly because of Spencer's attempts to conceal its trial strategy. The district court was correct in refusing to give jury questions on the elements of Olitsky's *prima facie* case, as those elements are not factual questions for the jury to decide. Spencer has failed to convince us that

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[26] *See Wheeler v. McKinley Enters.*, 937 F.2d 1158, 1163 n.2 (6th Cir. 1991) ("'Front pay' may be recoverable as well, but it cannot figure in the calculation of liquidated damages."); *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1210 (7th Cir. 1989) ("Since front pay is a prospective remedy, an award of front pay damages is not an 'amount owing' for purposes of section 626(b)."); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1556-57 (10th Cir. 1988) (finding that section 626(b), read in light of section 216(b) of the Fair Labor Standards Act, provides for two types of relief--"amounts owing" and other "legal or equitable relief"--and that front pay is included in the latter and is not subject to doubling); *Blum v. Witco Chem. Corp.*, 829 F.2d 367, 382-83 (3d Cir. 1987); *Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1258-59 (2d Cir. 1987) (front pay is not "amount owing"; as an equitable award, it is not subject to doubling under section 626(b)); *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1348 (9th Cir. 1987) ("By the express terms of the statute, liquidated damages are an additional amount equal to the backpay and benefits award" and thus do not include front pay.), *cert. denied*, 484 U.S. 1047, 108 S. Ct. 785, 98 L. Ed. 2d 870 (1988).

the district court's finding that Spencer violated section 510 of ERISA was clearly erroneous. In addition, the district court correctly refused to double Olitsky's front pay award, as such an award does not constitute an "amount owing" under the liquidated damages provision of the ADEA. For the foregoing reasons, the decision of the district court is AFFIRMED.

APPENDIX B

In The
United States District Court
for the Northern District of Texas

Dallas Division

JOHN D. OLITSKY	)	
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Plaintiff,	)	
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	)	
v.	)	CA3-84-1117-G
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	)	
SPENCER GIFTS, INC.,	)	
	)	
	)	
Defendant.	)	

* * * *

THE COURT: Well, I would appreciate having it. If I had known this question was going to come up, it would have been more helpful to have it earlier. For the purpose of saving time, let's do this. Let's go ahead and excuse all the witnesses who are not parties from the courtroom. I'll read the memorandum during opening statement, and if I conclude that the defendant is right, then they can bring this witness who's an expert back into the courtroom when we begin presenting testimony in the case.

I have also reviewed the motions in limine presented by the parties overnight and called my secretary this morning and asked that you be informed that except for the points that

were conceded by the opponent to each of the respective motions that I would deny the motions. I wanted to elaborate to you slightly on that ruling. That is not to say that I think all of the evidence which was the subject of the motions will necessarily be admitted. That of course is dependent on other factors such as the laying of a proper foundation and so forth. It is simply to say that I do not believe that I can conclude that the testimony is inadmissible on the grounds stated in the motions, and in fact, I think much, if not most of it, will be admissible upon a proper foundation, and it did not seem to me that any of the evidence was of such a sensitive or potentially prejudicial character that it could not be handled in the usual way by the standard objection and my ruling on the objection at the appropriate time.

* * * *

Q Mr. Olitsky, you were telling us about your job search after you were terminated with Spencer Gifts. What did you do at that point?

A I said I contacted as many people as I could to see if there was any openings. I made a contact with Zales and went in to interview for a job as executive vice president of the Aeroplex Division of Zales. I had a couple of interviews with the president of that division, and at the end of January I met the president of sales, Mr. Lipshy, and he said the job was mine under three conditions. I had to --

MR. ALBRIGHT: Your Honor, I would object to any hearsay, out-of-court statements at this time.

MR. GILLESPIE: I think he's entitled to testify about his job search and what he was told. What he was told is not the point. What is the point is he looked for other work. The point is he didn't--

MR. ALBRIGHT: I apologize. We're not disputing that Mr. Olitsky has pursued other jobs. I don't believe this testimony is admissible under the hearsay rules because it's a statement mad by a person who's unavailable to cross examine.

THE COURT: Let me get this straight. You are not making the argument here that Mr. Olitsky has failed to mitigate his damages by diligently pursuing other opportunities?

MR. ALBRIGHT: If I can rephrase what I'm not objecting to, your Honor. I think Mr. Olitsky has and will establish that he has made efforts to find other works, and Spencer Gifts is not disputing that. I cannot go so far as to say he has not mitigated his evidence as to reasons that the jury will find in the future from the evidence that maybe he did not mitigate, but we're not arguing that was through a lack of effort on the part of Mr. Olitsky in trying to find jobs.

THE COURT: I'll overrule the objection. You may answer the question that was posed to you.

* * * *

Q From the opening statement I believe a question has been raised about whether the fact that you had not obtained other employment indicates that you are recognized as being someone who's not suitable for high level employment. Let me ask you a question. What kinds of problems have you encountered that have kept you from getting high level employment since being terminated at Spencer Gifts and since the first trial of this case?

A Well, there are several perspectives. First of all, my age. I keep getting older. Also --

Q That's good, isn't it?

A That I'm getting old?

Q That you keep getting older.

A It's going to happen to everybody some day. Also, since the first trial it's more difficult because the entire gift industry is aware I won that case for a large amount of money.

MR. ALBRIGHT: Your Honor, may we approach the bench?

MS. SOKOLOVE: Yes, sir.

MR. ALBRIGHT: Your Honor, we'll need to take this up outside the jury's presence, and I think we're going to move for a mistrial on this case.

THE COURT: All right. Go ahead.

MR. GILLESPIE: Your Honor, I think he's entitled to tell about all the problems that he has had, and he's got a specific instance where someone in the gift industry came to him and congratulated him. He didn't tell the man about it. About having won this case, everyone knows about it. It has contributed to the fact that he can't get hired in the area that he is in. They are making an argument that he should have been fired at Spencer Gifts because he can't get hired now. That's the argument they are making.

THE COURT: All right.

MR. ALBRIGHT: Your Honor, can we excuse the jury so we can argue this to you, but if you will tell me it's fruitless we won't bother, but we will argue for a mistrial at this time.

(Jury out)

THE COURT: Why don't you tell me the grounds of your motion. You may step down, Mr. Olitsky, for the time being. Why don't you tell me the grounds of your motion, Mr. Albright.

MR. ALBRIGHT: Your Honor, I think it's as simple as it can be. There is absolutely no curative instruction that this Court can give to this jury to prevent them from realizing that there was another trial in which Mr. Olitsky was successful.

Prejudice by that cannot be erased from the Court. You cannot erase that. It has no probative value whatsoever as to Mr. Olitsky's success in this case. It was done simply to let this jury know that he won in the last trial, and we will prepare a brief if you would like one, and Spencer Gifts would move for a mistrial at this time.

THE COURT: Let me ask you this, Mr. Albright. I have been a little puzzled throughout the case as to the relaxed attitude that the parties were taking towards the existence of that previous trial and the reference to it. I believe Mr. Gillespie made an explicit reference to it in his opening statement yesterday without objection. Was it yesterday? Whenever he made his opening statement. And so I gathered that the defendant didn't mind the jury knowing that there was a previous trial and --

MR. ALBRIGHT: Your Honor, that would not be correct. Unfortunately, prior to the trial we had a discussion with the court reporter, and we were asking about having the Judge -- have you give a limiting instruction prior to the beginning of trial. Unfortunately, I was informed -- not unfortunately, but I was informed that it would be treated in this courtroom -- would be referred to as a prior

proceeding. Once Mr. Gillespie mentioned the prior trial I had to make the decision at that time not to stand up in front of the jury and object in which they could gain some idea that I was the one who didn't want that prior trial, the idea of the prior trial coming in.

THE COURT: Let me ask you --

MR. ALBRIGHT: I made the decision on behalf of my client as long as neither side objected to that point and only the reference was made to a prior trial the jury would have no way of knowing which side won and which side lost and why we're back here today anymore than they understand the difference between deposition testimony and trial transcripts. They are both under oath, but what we have done today is told this jury we won the last case.

THE COURT: You don't need to argue that point. I think you have answered my question. The other point that I want to ask though beyond the explanation you have given is, I reviewed evening before last a motion in limine that was probably two or three inches thick, and there was no reference that there was any objection to the reference to the former trial. If the matter is so prejudicial with all the other matters that you raised that I consider a lot less harmful than this, why wasn't it raised?

MS. SOKOLOVE: Your Honor, this Court was provided with instructions relative to a prior trial. This was a proposed instruction submitted by Spencer Gifts referencing -- It's a proposed instruction from Devit and Blackmar and as well as the Fifth Circuit -- referencing the existence of a prior trial which we anticipated this Court having given to the jury as a preliminary instruction once the jury was sworn in. We were advised there would be a reference to a prior proceeding and as Mr. Albright represented, ones Mr. Gillespie represented in opening statement or referenced a prior trial he

made a calculated decision in the best interest of our client not to object during Mr Gillespie's opening. But the Court has before it an instruction specifically referencing a prior trial, and that was not given to this Court.

THE COURT: Why don't you direct my attention to where that is?

MS. SOKOLOVE: I can, your Honor and I have it.

MS. SOKOLOVE: Your Honor, on Page 27 of the proposed jury instructions --

THE COURT: When were those filed?

MS. SOKOLOVE: They were filed, your Honor, with this Court on, September 18, 1990 pursuant to this Court's pretrial order.

MR. ALBRIGHT: Your Honor, apparently if I could add -- I want this to be clear -- another part of the reason didn't hear Mr. Olitsky say that he was awarded 1.2 million dollars from the stand?

MR. GILLESPIE: He didn't say that.

MR. ALBRIGHT: I'm sorry. He said he won a large amount of money in that trial.

MR. ALBRIGHT: And that as well would be an additional reason you could not cure the damage that has been done -- prejudicial damage to Spencer Gifts by any kind of instruction to this point.

THE COURT: Well, let me ask you this question, Mr. Albright. Plaintiff's counsel tells me -- and I haven't

heard this but to make a complete record I should hear it -- there is a specific point where someone in the gift industry came up to Mr. Olitsky after the first trial and congratulated him on the result without him having informed him about it which does intend to support an inference that the existence of that first trial was known in the gift industry, and the plaintiff contends it has had a chilling effect on his ability to find employment in that industry. I asked you specifically yesterday it you were dropping your contention that the plaintiff failed to mitigate damages, and you danced around that question and really didn't say yes that you were dropping that contention. So I don't know how the plaintiff can prove what the facts are if you're going to say that he didn't do everything he could do to find a job, but he can't refer to the previous trial.

MR. ALBRIGHT: Your Honor, let me be very clear about what I said yesterday to begin with. I said that we're not trying to establish that he has not made efforts in the industry to find another job. At this time it is not so easy in this case to say he has failed to mitigate his damages or not because we have several arguments along those lines. The fact that he left or was fired from Andre Piasso might be something that is mitigating to his damages. So whether Mr. Olitsky has pursued other work or not gotten other work does not answer the question of whether or not he has not mitigated his damages. The reason I danced around it was because there was no simple answer to your question, and I apologize if you felt I wan dancing around it. I believe there are several points at which the damages would have been mitigated. For example, had he not been fired from Andre Piasso. As to your first comment though, what if we were to say -- someone has come up to you and said, John, good verdict, that would be hearsay. So that would be inadmissible, and if he did have that kind of information, he would have been required to provide that to us in pretrial discovery so that we could go and depose this gentleman that they had

heard about that victory out in the marketplace and that's the reason they weren't giving him a job. That's who the plaintiff would have to put on the stand to testify that this man was getting a job out in the industry because of the verdict. All Mr. Olitsky can testify to is I filed a lawsuit, there was a trial and I won. He has no basis to testify to this jury that that has one wit of impact on his job search.

THE COURT: Well, I'm not sure I think it's quite as difficult for him to sustain his burden on this issue as you do, Mr. Albright, and again to repeat a phrase I used with Ms. Sokolove yesterday afternoon, I think the defendant is trying to have it both ways in this case, and I don't know that I think that's fair.

Mr. Gillespie, why don't we hear the testimony that you had alluded to or maybe you would want to make an offer of proof as to what that evidence would be.

MR. GILLESPIE: I would make an offer of proof that would expedite it I think. He would testify -- I believe he can give me the name. A person who he knew in the gift industry who came up to him after the first trial congratulated him on winning the case against Spencer Gifts. He can testify that the million dollar verdict was a headline--front page headline in Atlantic City, New Jersey.

MS. SOKOLOVE: Your Honor, that would be a person with knowledge of relevant facts that we have never heard of before.

MR. GILLESPIE: Bruce Shoutin came to him congratulating him. As far as the claim we should reveal this in pretrial discovery, they took his deposition twice since the first trial. They asked for interrogatories, and we gave them. They never asked why have you had trouble finding a job which would have elicited that answer, and we don't need to

call the person who came up to him and congratulated him because that's not being offered for the truth of the matter stated, but the fact that the word was out, that happened. Of course, if that hadn't happened John Olitsky could have said no I didn't or it wasn't a good jury verdict. But we are put in this bind where the defendant is attacking mitigation. The word that was danced around yesterday was the word "diligent." You asked if the defendant would stipulate or agree that plaintiff had made diligent efforts to mitigate his damages, and they would use that word "diligent." They said he made efforts.

MR. ALBRIGHT: That's simply not correct, your Honor. We would stipulate that they had mitigated their damages, and that was what I could not answer based upon whether or not he had been diligent in finding a job.

MR. GILLESPIE: I think when they are attacking his mitigation efforts we're entitled to show what he has done and what obstacles he ran into. That's the open and shut of it. As far as the previous trial not being considered, I think it's perfectly for the Court to instruct the jury as well in the final instructions as to the proposed Instruction Number 20. We have no objection to that whatsoever.

THE COURT: Well, I'm still trying to locate that. I think I'll ask have to ask Ms. Chang to assist me.

MR. GILLESPIE: I've got it here.

Let me see what the proposed instruction says. I can't locate it on the bench.

MS. SOKOLOVE: Your Honor, I have my copy I have given Ms. Chang. I am going to deny the motion for mistrial and give a cautionary instruction to the jury when be bring them back before we resume. I will still say in connection with that ruling that I am puzzled by the

defendant's contention that this is such a serious error as to require a mistrial when it was not even mentioned in the motion in limine which was quite voluminous about other points that I consider less significant. The defendant explains that by referring to this proposed Instruction Number 20 which Ms. Sokolove says it was contemplated I would give in my preliminary instructions to the jury, and I would have been willing to do so if it had been called to my attention and requested, but even if I had done so, this instruction contemplates that the jury is made aware explicitedly as it already was in Mr. Gillespie's opening statement that there was a previous trial, but there is no indication that either side objected to the jury knowing what was decided in that earlier trial. So I'm just puzzled as to why it was not brought to my attention earlier and to the attention of Mr. Gillespie that this is such a serious problem as is now contended would justify a mistrial.

MR. ALBRIGHT: Your Honor, I understand you have made your ruling.

THE COURT: Yes sir.

MR. ALBRIGHT: But because it is phrased in this way that you are puzzled, I want to make it very clear should this go up on appeal that Spencer Gifts believes there could not be anymore evidence that's more harmful and not correctable, and I also wanted to point out that it is obviously contemplated by that instruction that evidence of a prior trial might get before the jury. The question of whether or not Spencer Gifts was relaxed or not in terms of objecting to the reference of a trial has nothing to do with whether or not counsel for Spencer Gifts was relaxed in terms of letting the jury know the results of that prior trial; to wit, that the plaintiff won, and two, he won a lot of money. They have been now been instructed by Mr. Olitsky in a responsive manner that would not have given us a chance to know that

answer. They have now been instructed by Mr. Olitsky to give him a second victory and award him a lot of money like he won in the first case. I don't believe that can be cured by an instruction, and I want to make absolutely certain that you understand that part of the reason that we're at this point is because of Spencer Gift's reliance upon court personnel who told us the practice of this court in terms of referencing the prior trials is prior proceedings.

THE COURT: Well, I understand your position I think, Mr. Albright. I don't know that I would characterize the defendant's conduct any differently than relaxed. There were some matters that you considered so essential that I spent about two hours overnight -- the first overnight recess after jury selection because you said these matters were so critical that even to mention them in front of the jury was prejudicial,and no wherein that motion in limine was there any reference to this prior trial. As I say, most of those matters, in fact most of them in my view were not so sensitive that they couldn't be handled in the ordinary way at the time they were proffered for the jury's selection. So if the matter was so sensitive I'm mystified as to why it was not included in the motion in limine. So I understand your motion, and I have ruled. You are right.

(Jury in)

THE COURT: Mr. Olitsky, would you come back to the witness chair? Ladies and Gentlemen, before we proceed with the testimony of Mr. Olitsky, I want to give you an instruction concerning Mr. Olitsky's last answer, and that is that you have heard testimony about a previous trial of this case. The fact that this is the second trial is irrelevant to your consideration of this case. You should not consider the fact of a previous trial or its outcome in any way. Your verdict in this case must be based solely upon the facts as you find them from the evidence introduced at this trial with the law as

I shall give it to you during the trial or at the end of the case. With that instruction you may proceed, Mr. Gillespie.

BY MR. GILLESPIE:

Q Mr. Olitsky, I'm not asking you to repeat anything you have said before, but you were testifying about a comment that was made to you. Where was that comment made?

A I was at the World Trade Center here in Dallas or Irving.

Q Who made that comment to you?

A The man's name was Bruce Shouting, S-h-o-u-t-i-n-g, I believe.

Q Who was he?

A He was a salesman. He is a salesman who used to sell merchandise to Spencer Gifts. He used to sell us the MASH T-shirts.

Q Other than that piece of information about the word getting around, are you aware of other ways in which the first trial received publicity?

A Yes, I am.

Q Specifically?

A There was a headline on the Sunday after the trial in Atlantic City stating that I had won the case.

Q And stating the amount. I'm not asking you the amount.

A It stated the amount that I won.

APPENDIX C

In The
United States Court of Appeals
for the Fifth Circuit

No. 91-1010

JOHN D. OLITSKY,

Plaintiff-Appellee
Cross-Appellant,

v.

SPENCER GIFTS, INC.,

Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(July 28, 1992)

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BEFORE BROWN, KING and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

We are constrained to caution counsel for Spencer Gifts henceforth to exercise greater self-restraint in their briefs, motions, petitions, and other writings filed with this court. We admire and encourage vigorous advocacy; we deplore and discourage stridently pejorative rhetoric and unprofessional mischaracterizations of fact and law, particularly when such mischaracterization involves an order, judgment or opinion of this court. An apodictical example of the latter is found on the first page of counsels' petition for rehearing: Twice the panel opinion's affirmation of the district court's evidentiary ruling is characterized as punishment. In one instance the word *punishment*, and in another instance the word *punished*, is set off by quotation marks, yet neither ostensibly-quoted word appears anywhere in this panel's opinion! Neither is there even the slightest implication in either the distsrict court's or this panel's opinions that they were rendered punitively. The same lack of professionalism that is demonstrated by the intemperateness of counsels' petition for rehearing was demonstrated in counsels' original brief to this court.

Moreover, let counsels' client harbor no misconception that either the district court's evidentiary ruling or this panel's affirmation of that ruling was in any way punitive; Spencer Gifts' loss of this case cannot be laid at the feet of either court. This court, like most, assiduously avoids tarring the client with the brush intended for lawyers whose behavior we deem unprofessional.

But here we neither formally reprimand nor otherwise sanction counsel for Spencer Gifts. We do, however, seriously caution counsel against repeating such transgressions in the future.